PUBLIC BANK BHD v. PAUL CHEAH & ASSOCIATES

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUIT NO: D-22NCC-165-2011]
17 APRIL 2016

PARTNERSHIP: *Suits by and against partnerships – Action against firm – Solicitor from firm's branch acted for bank in loan transaction with third party – Third party defaulted in payment – Bank unable to proceed with foreclosure proceedings since charge on property in favour of bank discharged without bank's knowledge and consent – Whether firm liable for fraudulent act committed by solicitor – Judgment obtained against firm for damages suffered by bank – Whether former partner of firm liable at material date when discharge of charge took place – Whether former partner liable for debts incurred by firm when he was a partner at material time – Whether cause papers and notice of demand served on former partner – Whether bank's action time barred – Partnership Act 1961, s. 12*

The defendant was a firm of practicing solicitors with its main or head office in Kuala Lumpur and had a branch office in Subang Jaya. *Vide* a branch partnership agreement ('the agreement') dated 14 July 2006 entered into between Paul Cheah as the principal owner of the defendant law firm and Lee Choon Hei ('LCH'), the latter was made a partner of the firm from 1 July 2006 till 30 June 2008. Frankie Tan was the solicitor in charge of the Subang Jaya branch. The plaintiff, a licensed bank, appointed the defendant to attend to the legal documentation involving a fixed loan facility offered to Polyidaman Sdn Bhd ('Polyidaman') to refinance a 1 1/2 storey factory. As a form of security, Polyidaman charged the property to the plaintiff. The defendant's Subang Jaya branch handled the said conveyancing transaction. On or about 25 November 2008, Polyidaman defaulted in the repayment of its loan to the plaintiff. While preparing for the foreclosure proceedings, it came to the plaintiff's knowledge that (i) the charge over the property had been discharged from as early as 1 November 2006; (ii) the property was transferred from Polyidaman to one Shahrol; and (iii) the property had been charged by Shahrol to CIMB Bank Bhd on 1 November 2006. It was subsequently revealed that the plaintiff's charge was discharged by way of Form 16N which contained the forged signature of the plaintiff's officer and was witnessed by Frankie Tan on 12 October 2006. The plaintiff, however, argued that it did not have any knowledge about the discharge of the charge and transfer of the property. As a result, the plaintiff was unable to commence the foreclosure proceedings. Based on the claim for negligence, fraud caused by forgery and for breach of contract, the plaintiff commenced an action in the High Court in 2011 and obtained judgment against the defendant ('judgment') for the sum of RM561,483 with interest and cost. The plaintiff filed an application ('encl. 71') for leave to execute the judgment *vide* a bankruptcy action pursuant to O. 77 r. 5(4) of the Rules of Court 2012 ('ROC') against the partners of the defendant, including LCH. LCH, on the

A other hand, filed encl. 91 to strike out encl. 71 against him being the former partner of the defendant. It was argued that (a) the fixed loan transaction was done before LCH joined the defendant firm; (b) LCH did not have any knowledge regarding the fixed loan transaction since it was handled by the Subang Jaya branch under Frankie Tan; (c) Frankie Tan's letter dated
B 30 January 2015 and the defendant's letter dated 9 February 2015 stated that LCH was not liable for the judgment debt; (d) Paul Cheah's resignation from the firm on 1 August 2006 would invalidate the agreement; (e) Paul Cheah had induced LCH to enter into the agreement by fraud and misrepresentation; (f) the plaintiff failed to comply with O. 77 r. 3(2) of the
C ROC since the cause papers were not served on the partners individually; (g) the partnership between Paul Cheah and LCH was dissolved in June 2008; (h) the notice of demand was not served on LCH before legal actions were commenced against the defendant; and (h) the plaintiff's claim was time barred.

D **Held (allowing encl. 71; dismissing encl. 91)**

(1) The plaintiff did not sue the partners individually but sued the defendant firm of Paul Cheah & Associates. LCH was a partner of the firm as at 1 November 2006, *ie,* the material date the plaintiff's charge was discharged. Hence, according to s. 12 of the Partnership Act 1961, LCH
E was liable for the debts of the partnership (*Southern Empire Development Sdn Bhd v. Tetuan Shahinuddin & Ranjit & Ors;* foll). (paras 13-15)

(2) The defendant breached its contractual rights as the panel solicitors of the plaintiff when the defendant discharged the plaintiff's charge over the Polyidaman land. The cause of action only arose when the discharge by
F way of Form 16N was registered and the charge on the plaintiff was discharged on 1 November 2006. When the discharge of the charge occurred on 1 November 2006, LCH was a partner of the defendant firm. Thus, at the material date, all other partners of the defendant firm, including LCH, were liable for the actions of Frankie Tan. (para 19)

G

(3) The respective letters from Frankie Tan and the defendant stating that Frankie Tan and not LCH was liable for the judgment debt could not exonerate LCH as the court had to decide on this matter based on the evidence brought before it. In this regard, the trial judge had already held that all the partners of the defendant firm at the date of the discharge
H of the charge were liable. (para 21)

(4) The agreement was not binding on the third party. The agreement was made between LCH and the defendant firm and not between LCH and Paul Cheah since the latter signed it on behalf of the defendant firm. In the circumstances, LCH was liable for the liabilities of the firm to third
I parties. Since the defendant firm indemnified LCH from any suits taken by third parties against the defendant in respect of any of the other branches of the defendant, by implication, LCH was equally liable for those branches' liabilities to third parties. (para 25)

(5) The fraudulent act committed by Frankie Tan did not absolve the other partners from liability as if the object of the transaction was within the ordinary course of business of the firm. The actions of the fraudulent partner, though unlawful and illegal, were immaterial and s. 12 of the Partnership Act 1961 applied to render the defendant liable for those acts. (para 31)

(6) A partnership can in fact and in law be sued as a firm. The plaintiff was not obliged to serve the statement of claim to LCH since the cause papers were properly served on the firm. The partners were bound by the Partnership Act 1961 and were therefore liable for the liabilities against the firm. Since there was a final judgment against the defendant firm, all the partners at the relevant time were liable for the liability of the firm at that time, which includes LCH. In the circumstances, there was no requirement for a demand since the causes of action of the plaintiff was for negligence, fraud and general breach of contract, unlike, for instance, a claim made under an on demand guarantee when a demand was a prerequisite to trigger a cause of action. (paras 38, 39, 42 & 43)

(7) The judgment against which the plaintiff sought leave to execute remained a good judgment until it was set aside. Further, the plaintiff's claim was not time barred since the judgment was obtained on 30 November 2012 and time would only set in on 30 November 2024. Once a judgment is obtained, on account of the doctrine of merger, the judgment replaces all antecedent causes of action. *Vide* s. 6(3) of the Limitation Act 1953, the plaintiff has 12 years to enforce the judgment before it lapses. (para 44)

Case(s) referred to:

Alan Michael Rozario v. Merbok MDF Sdn Bhd [2011] 1 CLJ 433 CA ***(refd)***
British Homes Assurance Corporation, Limited v. Paterson [1902] 2 Ch 404 ***(dist)***
Clode v. Barnes [1974] 1 All ER 1166 ***(refd)***
Hamlyn v. Houston & Co (1902) 87 LT 500 ***(refd)***
Keow Seng v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered [1983] 1 LNS 18 FC ***(refd)***
MK Varma v. KM Oli Mohamed [1950] 1 LNS 39 HC ***(refd)***
Southern Empire Development Sdn Bhd v. Tetuan Shahinuddin & Ranjit & Ors [2008] 5 CLJ 195 HC ***(foll)***
Tan Thoo Yow v. Chia Kim San & Anor [1997] 1 LNS 536 HC ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd & Another Case [1989] 2 CLJ 148; [1989] 1 CLJ (Rep) 186 SC ***(not foll)***

Legislation referred to:

Limitation Act 1953, ss. 6(3), 32
Partnership Act 1961, ss. 8, 12, 14, 19(1)
Rules of Court 2012, O. 77 rr. 3(2), 5(4)

Other source(s) referred to:
Charles D Drake, *Law of Partnership*, 2nd edn, pp 54-55

(Encl. 71)
For the plaintiff/applicant - Goh Meng Yew & Nur Azwa Fadzil; M/s Iza Ng Yeoh & Kit
For the respondent - Lee Choon Hei; M/s Michael Lee & Assocs

(Encl. 91)
For the applicant - Lee Choon Hei; M/s Michael Lee & Assocs
For the respondent/plaintiff - Goh Meng Yew & Nur Azwa Fadzil; M/s Iza Ng Yeoh & Kit

Reported by Kumitha Abd Majid

JUDGMENT

Lau Bee Lan J:

Introduction

[1] Enclosure 71 ('encl. 71') is the plaintiff's notice of application for the following orders:

(a) that the plaintiff be given leave to execute the judgment herein dated 30 November 2012 ('the judgment') *vide* bankruptcy action pursuant to O. 77 r. 5(4) of the Rules of Court 2012 ('ROC 2012') against the following individuals who were the partners of the defendant:

(i) Sulaiman bin Mohd Said (I/C No: 500218-06-5263);

(ii) Lee Choon Hei;

(iii) Venu Nair; and

(iv) Tan Lyn Seang Frankie (I/C No: 651102-02-5313)

(b) costs of this application to be borne by the partners of the defendant; and

(c) further and/or other relief which the court deems fit and just in the circumstances.

[2] Consequently, Mr Lee Choon Hei filed his notice of application in encl. 91 ('encl. 91') to strike out the plaintiff's claim in encl. 71 against him being the former partner of the defendant. Both encl. 71 and encl. 91 were heard together.

[3] Having considered the written cum oral submissions of the parties, on 26 August 2015, I had allowed encl. 71 and ordered the following costs:

(a) cost of RM4,000 each to be paid by Mr Lee Choon Hei and Mr Venu Nair;

(b) cost of RM3,000 to be paid by Mr Sulaiman bin Mohd Said; and

(c) cost of RM2,000 to be paid by Mr Tan Lyn Seang Frankie.

In respect of encl. 91, I had dismissed the same with cost of RM3,000 to be paid by Mr Lee Choon Hei.

[4] *Vide* the respective notices of appeal filed on 4 September 2015 and 8 September 2015, Mr Lee Choon Hei ('LCH') is now appealing against the decision of allowing encl. 71 and for dismissing encl. 91. The reasons for my decision are set out below.

[5] In this proceeding, the following affidavits were filed in relation to encl. 71:

(a) plaintiff's affidavit in support affirmed by Liza binti Megat Jamil on 24 October 2014 ('encl. 72');

(b) affidavit in reply of LCH affirmed by him on 11 December 2014 ('encl. 76');

(c) plaintiff's affidavit in reply affirmed by Liza binti Megat Jamil on 30 December 2014 ('encl. 77');

(d) second affidavit in reply of LCH affirmed by him on 15 January 2015 ('encl. 84');

(e) affidavit in reply of Sulaiman bin Mohd Said affirmed by him on 15 January 2015 ('encl. 86');

(f) affidavit in reply of Venu Nair affirmed by him on 21 January 2015 ('encl. 94');

(g) plaintiff's second affidavit in reply affirmed by Liza binti Megat Jamil on 30 January 2015 ('encl. 99');

(h) plaintiff's affidavit in reply affirmed by Liza binti Megat Jamil on 4 February 2015 ('encl. 101');

(i) plaintiff's affidavit in reply affirmed by Liza binti Megat Jamil on 4 February 2015 ('encl. 102');

(j) additional affidavit of LCH affirmed by him on 23 February 2015 ('encl. 110') (leave to file additional affidavit was allowed on 17 February 2015); and

(k) plaintiff's third affidavit in reply affirmed by Chandramalar Devi Ramasamy Tommy Rudd on 3 March 2015 ('encl. 115').

[6] Accordingly, the following affidavits were filed in relation to encl. 91:

(a) applicant's affidavit in support affirmed by LCH on 19 January 2015 ('encl. 90');

(b) plaintiff's affidavit in reply affirmed by Liza binti Megat Jamil on 4 February 2015 ('encl. 100');

(c) affidavit in reply of LCH affirmed by him on 6 February 2015 ('encl. 104');

(d) additional affidavit of LCH affirmed by him on 23 February 2015 ('encl. 112'); and

(e) plaintiff's third affidavit in reply affirmed by Chandramalar Devi Ramasamy Tommy Rudd on 3 March 2015 ('encl. 115').

Facts Of The Case

[7] The plaintiff herein had successfully obtained the judgment after full trial dated 30 November 2012 against the defendant. The plaintiff's case against the defendant was founded on negligence, fraud caused by forgery and for breach of contract. The trial was presided by His Lordship Mah Weng Kwai J (as he then was) and in the result, the learned trial judge had allowed the plaintiff's claim against the defendant whereby the defendant was ordered to pay the plaintiff damages in the sum of RM561,483 as at 4 January 2011 with interest at 9.80% from 5 January 2011 until date of realisation with cost of RM180,000 and disbursement of RM27,335. The learned trial judge's grounds of judgment is exhibited in exh. 'C' of plaintiff's affidavit in reply. The defendant had appealed to the Court of Appeal and the appeal was dismissed on 5 August 2013 and thus, the judgment of the High Court was upheld.

[8] The facts which transpired before the trial judge which formed the basis of the judgment are as follows:

(a) the plaintiff is a licensed bank which appointed the defendant as its solicitors to attend to its offer of a fixed loan facility to Polyidaman Sdn Bhd ('Polyidaman').

(b) the defendant is a firm of practicing solicitors with its main or head office in Kuala Lumpur and a branch office in Subang Jaya. Frankie Tan Lyn Seang ('Frankie Tan') was the solicitor in charge of the Subang Jaya Branch.

(c) by a letter of offer dated 1 January 2003 the plaintiff offered a fixed loan facility of RM750,000 to Polyidaman to refinance a 1 ½ storey terrace factory. As a security Polyidaman executed a charge dated 28 January 2004 and charged the property to the plaintiff on 3 March 2004.

(d) the defendant was appointed to attend to the legal documentation to secure the loan and to perfect the security in favour of the plaintiff.

(e) it was the Subang Jaya branch of the defendant that handled the conveyancing transaction. By letter dated 8 March 2004 the defendant advised the plaintiff that it was in order to disburse the fixed loan to Polyidaman which the plaintiff did on 24 March 2004.

(f) the defendant forwarded by letter dated 22 November 2004 the following documents to the plaintiff for their safe keeping, namely:

(i) the original document of title of the property with the original plan;

(ii) duly stamped original Charge Annexure over the property dated 28 January 2004; and

(iii) the original Form 40 (Certificate of Registration of Charge).

(g) On or about 25 November 2008, Polyidaman defaulted in repayment of its loan. With a view of commencing foreclosure proceedings, the plaintiff appointed a firm of valuers to prepare a valuation report on the property. Arising from the report and from inquiries made at the land office, the plaintiff discovered that:

(i) the charge over the property had been discharged from early as 1 November 2006;

(ii) the property had been transferred from Polyidaman to one Shahrol @ Sahrol bin Mat Sum on 1 November 2006; and

(iii) the property had been charged by Shahrol to CIMB Bank Bhd on 1 November 2006.

(h) the discharge and transfer of the property was done without the knowledge and consent of the plaintiff which still holds the original title, the Charge Annexure and Form 40 in its custody.

(i) briefly, it is revealed, *inter alia*, that:

(i) the plaintiff's charge was discharged by way of Form 16N (discharge of charge) which contained the forged signature of plaintiff's officer and was witnessed by Frankie Tan on 12 October 2006;

(ii) the charge which was executed by Shahrol in favour of CIMB contained signature of Shahrol and officer of CIMB which were witnessed by Frankie Tan on 19 October 2006; and

(iii) the defendant had presented the discharge of the plaintiff's charge, the transfer and the CIMB charge by way of Penyata Perserahan dated 1 November 2006 at the Pejabat Tanah dan Galian Selangor.

(j) the fixed loan facility is still due and owing by Polyidaman and due to the breaches of the defendant, the plaintiff has lost its charge over the property and has been unable to commence foreclosure proceedings. Hence, the suit against the defendant for failing and/or refusing to pay the sum of RM561,483.62 claimed by the plaintiff as compensation for the loss of the charge over the property.

A

Contentions Of Parties

[9] With regards to encls. 71 and 91, briefly, the plaintiff contended the following, *inter alia*:

(a) Frankie Tan has not filed any affidavit in reply to encl. 72. Therefore,
B plaintiff prays for order in term for leave to execute judgment against Frankie Tan;

(b) plaintiff proceeded with this application for leave based on the information provided by Bar Council Malaysia *via* their letter dated 10 March 2014;

C

(c) the settlement agreement which is claimed to be achieved between the insurer and the partners of the defendant's firm are not relevant to the plaintiff's action and do not bind the plaintiff at all whereby the plaintiff is not a party thereto;

D (d) there is no delay in filing this application. In any event, the limitation period to enforce a judgment without needing leave of court is six years;

(e) it has already been decided by the trial judge in his grounds of judgment which was upheld by the Court of Appeal that:

E

> All the partners of the Defendant in the Head Office as well as in the Subang Jaya Branch are jointly liable for the loss and damages suffered by the Plaintiff due to the fraudulent acts, negligence, and breaches of contract committed by Frankie Tan. In the law of partnership there is no distinction between the branch and the Head Office in so far as liability is concerned.

F

> … The fact that Frankie Tan had carried out the transactions in respect of the property in a fraudulent manner does not exempt the firm from being liable under Section 12 of the Partnership Act 1961.

(f) the plaintiff is not obliged to serve the statement of claim to LCH since
G the cause papers were properly served on the firm. Since there is a final judgment against the defendant firm, all the partners at the relevant time are liable for the liability of the firm at that time - which includes LCH who admits being a partner of the firm as at 1 November 2006;

(g) the issues raised by LCH that the partnership agreement was allegedly
H terminated due to the resignation of Cheah Boon Hoe ('Paul Cheah') as partner of the defendant's firm are not relevant. In any event, the branch partnership agreement itself does not say that the branch partnership agreement is terminated if Mr Paul Cheah ceases to be a partner subsequently;

I

(h) the facts given by LCH were misleading the court. The cause of action happened on 1 November 2006 when Frankie Tan as one of the partners attended to the discharge of charge of the property. It was within the duration of partnership for LCH ie, from 1 July 2006 to 30 June 2008 and therefore he should be liable for the wrongdoing of the other partner; and

(i) it is not a case that is subject to being struck off – on the contrary there is no reason shown why leave to enforce the judgment should not be given.

[10] In resisting the plaintiff's application herein and in support of its striking out application, LCH argued the following, *inter alia*:

(a) LCH was not given the opportunity to defend himself at all material times, not made a party to the suit when the suit started in year 2011. Hence, a breach of natural justice;

(b) the branch partnership agreement between the principal owner/Paul Cheah of the defendant's law firm and LCH was only confined to the Port Klang branch and LCH does not have any power to borrow or lend money on behalf of the Port Klang branch;

(c) the loan and the breach is a continuing process and cannot be separated to exist independently because they are interlinked. The plaintiff is relying on the partnership principle that all partners are responsible without taking into account whether the acts were done before or after one joined the partnership. If this is true then it goes against the principle of s. 19(1) of the Partnership Act 1961 ('Partnership Act') and also against giving the opportunity of the right of defence to LCH;

(d) The partnership of Paul Cheah and LCH is based on the branch partnership agreement dated 14 July 2006 signed by both parties. When Paul Cheah stated then he will resign as senior partner from Messrs Paul Cheah & Associates, which would involve the branch partnership agreement with LCH. Paul Cheah had written the letter dated 26 June 2006 to the Bar Council indicating his intention but yet signed the branch partnership agreement with LCH in July 2006. Since Paul Cheah had resigned effective 1 August 2006 from the defendant's partnership, then the branch partnership agreement entered in with LCH would be at an end effective 1 August 2006;

(e) there is nothing to connect or indicate that LCH has a contract with the plaintiff. LCH was not mentioned at all in the grounds of judgment;

(f) there is no cause of action;

(g) plaintiff did not serve the notice of demand before commencing legal action and no cause papers were served on LCH;

A (h) there is a need to consider whether the plaintiff's claim is time-barred or not; and

(i) plaintiff failed to comply with O. 77 r. 3(2) of the ROC 2012.

[11] In opposing the plaintiff's application herein, Venu Nair and Sulaiman B submitted in the following manner, *inter alia*:

(a) there has been an inordinate delay on the part of the plaintiff in filing their application which is almost two years after the plaintiff had obtained judgment against the defendant;

C (b) the plaintiff's application is barred and/or defeated by "laches" pursuant to the provisions of s. 32 of the Limitation Act 1953;

(c) the act of witnessing the discharge of a charge by Frankie Tan without the consent of the plaintiff was not an act relating to the business of the kind carried on by the firm within the meaning of s. 8 of the Partnership D Act 1961;

(d) Frankie Tan had not been acting in the ordinary course of business of the firm. It was not in the ordinary course of business of the firm to do an act which is criminal in nature. Since it was outside the ordinary course of business and unlawful, therefore cannot be bound by the E unlawful act. Only bounded if the act was within the ordinary course of business as envisaged by s. 12 Partnership Act 1961;

(e) both was not implicated in the fraudulent acts transpired. Section 14 of the Partnership Act 1961 provides for joint liability for contracts and recovery of damages and fines, not criminal liability; and

F

(f) the defendant has entered into a settlement agreement through a mediation process with Pacific & Orient Insurance Co Berhad. The said insurance company has agreed to provide coverage under the Bar Council Professional Indemnity Insurance Scheme for the sum of RM400,000. Since the defendant is still operational, the plaintiff should G enforce the judgment against the defendant and exhaust their remedies therein. If the plaintiff enforced the said judgment against the defendant, the defendant could have recourse against the insurer pursuant to the said settlement agreement for breach of agreement in the event the insurer refused to comply the said settlement agreement.

H

Findings

Encls. 71 and 91

[12] I shall deal with encls. 71 and 91 of LCH together. With respect I find there are no merits in the contentions of LCH for several reasons.

I

Breach Of Natural Justice Allegation

[13] Firstly, the question of breach of natural justice alleged by the LCH does not arise. There was no need for an explanation from LCH as the plaintiff did not sue the partners individually but sued the defendant firm of Paul Cheah & Associates. Judgment was entered against the defendant firm after a full trial on 30 November 2012. Based on the evidence, LCH was a partner of the defendant firm as at 1 November 2006, the material date the charge was discharged, hence he is liable for the debts of the partnership under s. 12 of the Partnership Act 1961.

[14] Section 12 of the Partnership Act 1961 reads:

> Where, *by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting* or omitting to act.
>
> (emphasis added)

[15] For the interpretation of s. 12 of the Partnership Act 1961, I gratefully adopt the view held by Hishamudin Mohd Yunus J (as he then was) in *Southern Empire Development Sdn Bhd v. Tetuan Shahinuddin & Ranjit & Ors* [2008] 5 CLJ 195 as follows:

> (1) The liability of the firm/partnership is distinct and different from the liability of the firm's partners. It is true that a partnership, being not a human being but merely an artificial legal entity, on its own can do nothing. Therefore on its own it can do no wrong. *The partnership acts through its human agency – its partners. Every act or omission of the partners directly pertaining to the partnership is in law deemed to be an act or an omission of the partnership.*
>
> (2) The law recognises two types of liability in partnerships, ie, the liability of the partners and the liability of the partnership. Section 11 and 19 of the Partnership Act 1961 were irrelevant in the present case as they concerned with the liability of partners. The actual issue herein concerned the liability of the firm or partnership. In that regard, s. 12 of the Act, a provision relating to the liability of the firm/partnership itself, should be resorted to. It is true that before any liability can be attributed to a partnership, a wrongful act or wrongful omission (that relates directly to the partnership) must first be committed by a partner. *However, there is nothing in s. 12 or anywhere else in the Act that states that the liability of the firm incurred by reason of a wrongdoing of a partner ceases once the errant partner ceases to be a partner of the firm.*
>
> (3) By *virtue of s. 12 of the Act, the liability of the firm is distinct from the liability of the partners. Therefore, the liability of the firm is not affected by any partner ceasing to be a partner of the firm. Although the particular errant partner has long left the partnership, the liability of the firm still continues – subject only to any law pertaining to limitation of actions …*
>
> (emphasis added)

[16] This is in fact the exact position held by Mah Weng Kwai J (as he then was) in the instant case, wherein His Lordship relied on the case of *Southern Empire Development* (*supra*) as to the liability of the defendant firm. The learned trial judge's decision was affirmed by the Court of Appeal. I have captured the pertinent part of the grounds of judgment in para. 9(e) above, but it bears repeating:

> ... The fact that Frankie Tan had carried out the transactions in respect of the property in a fraudulent manner **does not exempt the firm from being liable under Section 12 of the Partnership Act 1961**.
>
> (emphasis added)

[17] LCH argues:

> The obligation arises from the fixed loan transaction was conducted by the defendant Subang Jaya branch managed by Frankie Tan back in year 2003/2004 before Lee Choon Hei joined the defendant firm in July 2006. Even though the breach of fixed loan facility happened on 25/11/2008, the transaction remained what it was originally initiated by the defendant and/or the Subang Jaya branch run by Frankie Tan. Lee Choon Hei has nothing to do with the fixed loan or have any knowledge of the contract or breach.

[18] I am of the view this argument is flawed as the pleadings and the grounds of judgment show that the judgment debt has nothing to do with any loan disbursed to the defendant but it is about a charge (see para. 2.7 p. 4 of the grounds of judgment in plaintiff's affidavit in reply). Further, as correctly pointed out by the plaintiff I find the following matters are completely irrelevant, namely:

(i) the fact that the loan was approved earlier and disbursed earlier to Polyidaman Sdn Bhd (the borrower) as far as the cause of action against the defendant is concerned because the defendant firm had done nothing wrong at that point; and

(ii) the subsequent default by Polyidaman Sdn Bhd (the borrower) of their loan agreement with the plaintiff on 25 November 2008 as it has nothing to do with the defendant firm.

[19] Based on the factual matrix of the case upon which the judgment was obtained against the defendant, the defendant breached its contractual rights as the panel solicitors of the plaintiff when the defendant discharged the plaintiff's charge over the Polyidaman land even though the signature of the bank officer on Form 16 N was forged and witnessed the signature and presented the signature, all of which was done by Frankie Tan, a partner of the defendant. (see para. 2.7 pp. 4-5 of the grounds of judgment). The cause of action only arose when the discharge form by way of Form 16 N was registered and the charge of the plaintiff was discharged and this occurred on 1 November 2006. Thus as at this material date, all other partners of the defendant firm, including LCH are liable for actions of Frankie Tan.

Liability Of Incoming Partner Allegation

[20] With respect I am of the view that LCH's submission that the plaintiff is making all partners responsible without taking into account whether the act was done before or after the partner joined the firm is flawed. LCH admitted he was a partner of the defendant firm *albeit* the Port Klang branch from July 2006 till June 2008. Therefore since LCH is a partner of the defendant firm as at the date of the breaches committed by Frankie Tan (a partner of the defendant firm) ie, 1 November 2006, LCH is liable for such breaches.

[21] In relation to Frankie Tan's letter dated 30 January 2015 and the defendant's letter dated 9 February 2015 that Frankie Tan and not LCH is liable for the judgment debt, in my view such letters cannot exonerate LCH as it is the court who decides on this matter based on the evidence brought before it. In this regard, the learned trial judge has already held that all the partners of the defendant firm at the date of the discharge of the charge are liable.

[22] LCH contends that he was not aware of the court order of 30 November 2012 and he has no knowledge of the settlement between the defendant and the insurer for the sum of RM400,000. This is immaterial since this has nothing to do with the plaintiff as it is not a party to their agreement with the insurers nor the partnership agreement. In this regard, LCH can seek an indemnity against the insurer or the other partners of the defendant firm at the relevant date if he so desires.

[23] LCH argues that Paul Cheah's subsequent resignation from the firm on 1 August 2006 after LCH became a partner of the firm in July 2006 would invalidate the branch partnership agreement as Paul Cheah had induced him to enter into the agreement by fraud and misrepresentation and therefore renders LCH not liable for the judgment debt. I find the argument of LCH as misconceived.

[24] Firstly, LCH has by his own admission acted as a partner of the defendant firm from 1 July 2006 till 30 June 2008. He was declared by the Bar Council as a partner of the defendant firm for the said period (exh. B in plaintiff's affidavit in support).

[25] Secondly, the branch partnership agreement is not binding on the third party. As for LCH's lack of knowledge of the offence committed by Frankie Tan, the learned trial judge relying on the Court of Appeal case of *Alan Michael Rozario v. Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 made the finding that "although the second defendant was "not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter did not absolve him in law under the Partnership Act 1961, of his liability as a partner of the firm at the material time".

[26] Thirdly, the branch partnership agreement relied on by LCH (exh. LCH-2 of Additional Affidavit of LCH reads:

> PARTIES:
>
> 1. Paul Cheah & Associates of …
> 2. Lee Choon Hei …

[27] It is pertinent to observe this very agreement exhibited by LCH himself reveals:

(i) it is made between LCH and the defendant firm and not between LCH and Paul Cheah as Paul Cheah signed on behalf of the defendant firm; and

(ii) that LCH is liable for the liabilities of the firm to third parties as is evident from cl. 19(1) which reads:

> 19.1 **The Law Firm**/Principal Owner shall at all times **indemnify the Branch Partner** against all losses, damages, actions, negligence suits or any form of legal proceedings **taken against the Partnership** in respect of or any action arising from the Kuala Lumpur, **Subang Jaya**, and Klang branches whether by its staff or legal assistants (if any) …
>
> (emphasis added)

[28] Since the defendant firm indemnified LCH from any suits taken by third parties against the defendant firm in respect of any of the other branches of the defendant firm, by implication, LCH is equally liable for those branches' liabilities to third parties. Otherwise what is the logic of having the indemnity clause.

[29] I shall now distinguish the cases which LCH cited. The irrelevancy and inapplicability of the case of *British Homes Assurance Corporation, Limited v. Paterson* [1902] 2 Ch. 404 has been correctly submitted by the plaintiff as follows:

> The very unique and special facts of British Homes Assurance Corporation that caused election to become relevant in that case, are clearly totally inapplicable to this case because [T]he lender in [British Homes Assurance Corporation] was told by Atkinson that he had entered into a new partnership with Paterson under Atkinson & Paterson but the lender ignored the notification and instead elected to continue dealing with Atkinson & Atkinson by making the cheque payable to that firm. As such the lender chose to refuse to agree to a novation of the agreement to Atkinson & Paterson, and Farwell J found that the lender could not retract their election to sue Paterson instead. However in our case the Plaintiff has never elected not to recognise any incoming partner of the Defendant as a partner of the firm. The Plaintiff has never refused to deal with LCH as a partner of the Defendant. The Defendant firm has stayed

the same name throughout. Instead LCH's name has appeared during the relevant period on the Defendant firm's letterhead and the Plaintiff continued to deal with the Defendant firm – which also means that the Plaintiff recognised LCH as partner of the Defendant.

[30] LCH's reliance on the *Law of Partnership* 2nd edn by Charles D Drake at pp. 54-55 is misplaced on two counts:

(a) with regard to 'acts outside the ordinary course of business' the learned author, Mr Drake in referring to the case of *Tendering Hundred Waterworks Co. v. Jones* stated "The firm will not be liable if the partner's act was not performed *qua* partner". In other words, the other partners are only liable for actions done by their partner if he did it as a partner of the firm and not in some other capacity. Thus in this case where the errant solicitor-partner accepted a title deed for a land conveyance to him as a secretary for a company holding it as trustee for that company, they are not liable for that deed because the errant partner did so as the company secretary and not as a partner of the law firm.

(b) the learned trial judge in the instant case has conclusively decided and upheld by the Court of Appeal that Frankie Tan did what he did in the ordinary course of business of the defendant law firm as partner of the defendant and that the other partners of the defendant are liable for what he did regardless of the fact that it was fraud and regardless of whether they knew about it or not.

(see pp. 40-41 of the Grounds of Judgment in plaintiff's affidavit in reply).

[31] In any event the fraud of Frankie Tan does not absolve the other partners from liability as if the object of the transaction is within the ordinary course of business of the firm, then the fact that that object was achieved through illegal means was irrelevant to the determination that it was within the ordinary course of business of the firm and therefore the firm is liable under s. 12 of the Partnership Act. This is borne out by the following cases:

(a) *Hamlyn v. Houston & Co* (1902) 87 LT 500 at 502 where it was held that a partner's action in bribing a clerk in a rival firm causing loss to that firm, caused that partner's firm to be liable for his wrongful act because he was acting in the ordinary course of business of the firm. Since it was in the ordinary course of business of that firm to obtain information about a trade rival, the partner was acting within the scope of his authority and the fact that the partner did so illegally was immaterial.

(b) *Clode v. Barnes* [1974] 1 All ER 1166 at 1168-1169 where the other partner who is ignorant of the offence committed by his partner was also liable for the same offence as a partner.

(c) *Alan Michael Rozario v. Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 at 443 where the Court of Appeal held:

(i) [20] We are unanimous that the allegation that the 2nd defendant was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter, does not absolve him in law, under the Partnership Act 1961, of his liability as a partner of the firm of Shuhaiza & Partners, at the material time"; and

(ii) [24] We further agree with the High Court Judge when he ruled:

> In determining whether the act of the firm was done in the course of the business of the firm one need not look behind what the first defendant and the 3rd defendant had in mind when they entered into the consultancy agreement. **Intention is irrelevant** – for even 'the devil knows not what the mind thinks'. All that one would have to judge is whether the agreement prepared by the 1st defendant was on the face of it done in the course of the business of the firm. There could be no doubt that the preparation of an agreement was within the course of the business of the legal firm of Shuhaiza & partners.
>
> *It follows therefore that the defendants' submission that the act of the 1st defendant partner having been performed with an ulterior motive of being bribed to an official of KESEDAR is irrelevant*.
>
> (emphasis added)

Thus it is clear the actions of the fraudulent partner though unlawful and illegal are immaterial and s. 12 of the Partnership Act 1961 applies to render the defendant liable for those acts.

Privity Of Contract Argument

[32] Basically LCH argues that he has no privity to the fixed loan given by the plaintiff to the defendant Subang Jaya branch office and hence he is not liable. With respect LCH's argument cannot be sustained. As alluded to before in this case it is not about any loan given by the plaintiff to the defendant. Rather the plaintiff sued the defendant firm as Frankie Tan, a partner witnessed a forged Form 16N and then presented it to the land office causing the plaintiff to lose its charge over the land charged by Polyidaman. When the discharge of the charge occurred on 1 November 2006, LCH was a partner of the defendant firm.

Cause Of Action And O. 77 r. 3(2) Arguments

[33] LCH contends the plaintiff failed to comply with O. 77 r. 3(2) of the ROC 2012 as the plaintiff failed to serve the cause papers on the individual partner individually as the partnership between Paul Cheah and LCH was dissolved in June 2008 when the Plaintiff commenced action in 2011. I am of the view LCH's argument is untenable.

[34] Order 77 r. 3(2) of the ROC 2012 provides:

> (2) **Where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun**, the writ by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action.
>
> (emphasis added)

[35] In this present case the defendant firm only ceased practice on 31 December 2013 when its last two partners, Venu Nair and Sulaiman "ceased to be a partner of Messrs Paul Cheah & Associates" (exh. B in plaintiff's affidavit in support).

[36] LCH raises the allegation of replacement title occurring before LCH joined the defendant firm as he contends a replacement of a title would take between 6 to 12 months in normal conveyancing practice. I am of the view this argument is totally misconceived as this allegation of fact is unsubstantiated and constitutes a statement from the Bar which ought not to be entertained.

[37] LCH contends that he was not served with all the cause papers when the suit was first served on the defendant. I find there is no merit in LCH's contention.

[38] First, the plaintiff is not obliged to serve the statement of claim to LCH since the cause papers were properly served on the firm.

[39] Secondly, the partners are bound by the Partnership Act and therefore are liable for the liabilities against the firm. Since there is a final judgment against the defendant firm, all the partners at the relevant time are liable for the liability of the firm at that time – which includes LCH who admits being a partner of the firm as at 1 November 2006.

[40] The judgment of 31 November 2012 against which the plaintiff is seeking leave to execute *vide* encl. 71 remains a good judgment until it is set aside and "[O]nce perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation…" (per Peh Swee Chin FCJ (as His Lordship then was) at 417 D-E & G-H).

Service Of Notice Of Demand And Cause Papers Argument

[41] LCH contends by not serving the notice of demand before commencing the legal action, he has been deprived of the opportunity to defend himself; and the matter was compounded by the fact no cause papers were served on him before the commencement of the suit in 2011 and he came to know of the plaintiff's action in November 2014 when the notice

of application to seek leave to execute judgment of 30 November 2012 was served on him. With respect I am of the view the aforesaid contention of LCH bears no merit whatsoever.

[42] As has been correctly submitted by the plaintiff, the plaintiff was not suing the individual partners of the defendant firm but the defendant firm. This was the position taken by the learned trial judge that "a partnership can in fact and in law be sued as a firm" which position is supported by several authorities, including *MK Varma v. KM Oli Mohamed* [1950] 1 LNS 39; [1950] MLJ 80; *Tan Thoo Yow v. Chia Kim San & Anor* [1997] 1 LNS 536; *Keow Seng v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 1 LNS 18; [1983] 2 MLJ 103 at 105 which decision was upheld by the Court of Appeal. This is evident from pp. 13-14 of the grounds of judgment in plaintiff's affidavit in reply).

[43] In suing the defendant firm, the plaintiff is seeking to enforce the judgment against all the partners at the time of the cause of action, ie, 1 November 2006. As I have alluded to earlier, LCH was a partner of the defendant firm as at this material date. In this instance there is no requirement for a demand since the causes of action of the plaintiff is for negligence, fraud and general breach of contract unlike for example, a claim made under an 'on demand' guarantee when a demand is a prerequisite to trigger a cause of action. Thus LCH's reference to the case of *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd & Another Case* [1989] 2 CLJ 148; [1989] 1 CLJ (Rep) 186; [1989] 3 MLJ 155 where the Supreme Court held "[A] proper demand must be made and it is a condition precedent to establishing a claim against a guarantor." is irrelevant and inapplicable in the context of the present case.

Limitation Argument

[44] LCH argues that the plaintiff's claim is time barred. This is absolutely without any merit. I agree with the plaintiff's submission the plaintiff's claim is not time barred since the judgment was obtained on 30 November 2012, time will only set in on 30 November 2024 which is about nine years from now. The reason is once a judgment is obtained, on account of the doctrine of merger, the judgment replaces all antecedent causes of action, and the only limitation that is applicable after that is found in s. 6(3) of the Limitation Act 1953 which provides:

> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Thus from the provision of s. 6(3), it is clear the plaintiff has 12 years to enforce the judgment before it lapses.

Conclusion

[45] For all the reasons stated above the court allowed the plaintiff's application in encl. 71 and dismissed LCH's application to strike out in encl. 91 accordingly.